BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

REANNA DIXSON, Claimant, v. PARKE VIEW CARE AND REHABILITATION CENTER, Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	)	**IC 2006-513747** **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** FILED OCT 21 2008

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Twin Falls on May 15, 2008. Dennis R. Petersen represented Claimant. Todd J. Wilcox represented Defendants. The parties presented oral and documentary evidence. They agreed posthearing that scheduled depositions were not needed for this record. They submitted briefs. The case came under advisement on October 7, 2008. It is now ready for decision.

ISSUES

The issues identified in the Notice of Hearing were narrowed at hearing. In posthearing briefing, the parties agreed to limit the issues to the single issue set forth below:

> Whether Claimant suffered an injury caused by an accident arising out of and in the course of employment.

The parties agreed that physicians would testify that, if Claimant's allegations about the occurrence of an accident were believed, the accident could have caused the injury she claims. All other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant contends she injured her right shoulder at work while lifting and transferring a patient into a shower on May 22, 2006. Initially thinking it a minor strain, she did not immediately report it. She did seek chiropractic treatment and informed the physician about the accident. When the chiropractor released her from work, Claimant notified Employer of the accident.

Defendants contend no accident occurred. Claimant did not initially report it. She denied it when confronted about it the next day. She has admitted she made false statements about prior injuries in a letter to Employer. Claimant has experience in making workers' compensation claims. Her failure to promptly do so this time casts doubt upon the alleged occurrence. Claimant's credibility is in question.

The parties agree notice was timely given according to Idaho statutes.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Hearing testimony of Claimant and Employer's representatives Shauna Kraus and Wendy Calderon;
2. Claimant's Exhibits 1 – 17; and
3. Defendants' Exhibits 1 – 10 (less three pages of exhibit 5 which were withdrawn by Defendants at hearing).

After considering the record and briefs of the parties, the Referee submits the following findings of fact, conclusion of law, and recommendation for review by the Commission.

FINDINGS OF FACT

1. Claimant works for Employer as a certified nurse's assistant ("CNA"). She has worked there off and on since October 2000. Her most recent employment there began in January 2005.

2. Employer operates a skilled nursing facility. Many of its patients require full care.

3. On May 22, 2006, Claimant arrived at work to begin her shift at 6:00 a.m. She began her day by giving patients showers. A co-worker nearing the end of her own night shift helped Claimant lift and transfer the first patient into the shower. The first patient was not sitting squarely in the shower chair. Claimant and the co-worker lifted him to place him more safely in the center of the chair.

4. As she lifted this first patient, Claimant felt a "tight pull" through the front of her right shoulder. Claimant "cringed." The co-worker asked if Claimant was okay. Claimant said she was. Claimant's shoulder did not significantly hurt through the rest of her shift.

5. Later, during that shift, Claimant mentioned the incident to another co-worker.

6. Claimant completed her duties and shift that day. She left work about 11:30 a.m. This was not an unusual time for her to finish her work day.

7. She retrieved her son from day-care, went home, and took a nap. Arising from the nap about two hours later, she noticed pain in her shoulder and arm, together with numbness in her hand. She did not otherwise hurt herself between the time she lifted the first patient and she arose from her nap.

8. She made an immediate appointment with her chiropractor, Wade Davis, D.C.

9. As she walked to her chiropractic appointment, Claimant saw her sister who is also a co-worker or supervisor for Employer. Claimant told her sister about the accident.

10. Dr. Davis treated Claimant's entire back. Dr. Davis treated Claimant on May 22, 24, 26, 30, June 2, 5, 7, 9, 12, 15, and 20. His initial note confirms Claimant's pain "started while lifting and transporting a patient today at work." He released her from work.

On June 21, he confirmed Claimant's initial account of the accident as follows:

> She was transferring a patient with another assistant when she felt a pulling sensation on the right shoulder and upper back. She continued to work and then went home and took a nap. When she woke the pain was intense.

11. After her chiropractic visit, Claimant used ice and heat on her shoulder at home.

12. About 10:30 p.m., Claimant contacted Employer by telephone to report she would not be at work the next morning. She talked to Erica Avila. Ms. Avila was a charge nurse on duty that evening.

13. The following morning, May 23, Claimant went to Employer's facility to deliver Dr. Davis' release from work. She gave it to Employer's HR manager, Wendy Calderon. Ms. Cladero n testified she did not recall seeing or receiving it. (A copy of that release is not in the record, but a release from Dr. Davis dated May 24 is among the documents comprising Employer's personnel file on Claimant.)

14. Earlier that morning, Ms. Calderon had been informed by the facility administrator, Shauna Krause, that Ms. Krause wanted to talk to Claimant. When Claimant arrived, she was taken to Ms. Krause. Ms. Krause questioned Claimant. Their conversation lasted 30 to 45 minutes. Claimant testified she was not allowed to explain herself because of Ms. Krause's manner and interruptions. Ms. Krause refused to accept the chiropractic release and instructed Claimant to visit Employer's authorized physician. Ultimately at that visit, Claimant did not complete a notice of injury form for purposes of workers' compensation.

15. Ms. Krause authored a short summary of that meeting. Both she and Ms. Calderon signed it.

16. Claimant next contacted Employer on May 26 to complete an injury report. Ms. Krause authored a short note about this visit.

17. On June 2, Claimant requested sick leave benefits because Employer had told Claimant she would not get workers' compensation benefits. Employer denied Claimant sick leave benefits because she had made a workers' compensation claim. Employer "offered" to allow Claimant to use vacation benefits. Claimant was never paid for her initial absences by any means, TTDs, sick leave, or vacation leave.

18. Ms. Krause authored a short summary about the June 2 conversation. Ms. Calderon also signed it.

19. On June 14, Claimant wrote a letter to Ms. Krause. In it she attempted to explain her position and to reconcile any misunderstanding that may have arisen from the May 23 meeting. She also wrote, alleging her shoulder had "slipped out" while working on other occasions. Under oath, Claimant admitted this allegation was inaccurate.

20. On June 21, Claimant started treating with Employer's authorized physician, Daniel Henrie, M.D. Dr. Henrie noted a history consistent with Claimant's testimony, except that he reported she initially "noted some pain . . . but 3 hours later, after she had gone home she had severe pain." He recommended she remain off work.

21. On June 23, an MRI showed a partial-thickness rotator cuff tear.

22. On July 6, Claimant was treated by Gilbert Crane, M.D. He recorded a history of the accident which was consistent with Claimant's hearing testimony. However, the history of her pain complaint was less consistent. His note indicated "immediate fairly severe pain" followed by worse pain "three hours later." He examined Claimant and recommended modified-duty work. Claimant visited Dr. Crane only once more, on August 3.

23. Claimant returned to work at light duty on July 7. Her pay was reduced from $8.45 per hour at the time of the alleged accident to $5.15. She returned to full duty on \ September 1. Her pay rate when she returned to full duty was raised to $8.00 per hour.

She was promoted in November and received a raise. As of the date of the hearing, Claimant continues to work for Employer. She earns $12.00 per hour.

Prior Medical Care

24. Claimant occasionally visited Dr. Davis for chiropractic care before May 22, 2006. The last visit before the accident date occurred on March 9, 2005. At that visit, Claimant was "feeling sore." Dr. Davis treated her entire back, perhaps emphasizing the lumbar area. Claimant's complaint and symptoms were distinctly different on May 22, 2006, than they had been at her last visit more than one year before.

25. Other prior medical records are not relevant to the issue at hand.

DISCUSSION AND FURTHER FINDINGS OF FACT

26. **Credibility.** Claimant is a soft-spoken, submissive young woman (age 27 at accident) who admittedly exaggerated her previous unreported minor work injuries in a letter to Employer. Her demeanor at hearing was consistent with her description of the May 23 meeting.

27. Claimant is not semantically adept. As a result, portions of her testimony are imprecise or not fully comprehensive. Under cross-examination, when these are contrasted with other portions of her testimony an appearance of inconsistency arises. When confronted with such alleged inconsistencies she does not always explain herself lucidly. Nevertheless, every part of her testimony is reconcilable into a consistent whole. Her imprecision in use of language was not intended to deceive the Commission.

28. Defendants' counsel made a thorough and skilled demonstration of such points of potential impeachment. Upon careful review, these points are of minor consequence. Particularly when compared to Employer's witnesses, Claimant is a credible witness.

29. Ms. Krause exhibited a selective memory – very detailed when it helped her, vague or absent when it might not – about events and conversations surrounding Claimant's efforts to make a workers' compensation claim. Similarly, her note-taking appears purposefully selective. It is silent concerning or inconsistent with portions of her detailed recollections. Her detailed recollections and notes receive little weight as evidence. Moreover, Ms. Krause's testimony suggests Employer's policy is applied – at least in this instance – to avoid workers' compensation claims before they can be made. For example, whether Ms. Avila, being a charge nurse, is or is not a supervisor, appears designed to dissuade a potential claimant from asserting her statutory rights by intimidating her into believing she gave improper notice. Also, requiring a two-on-one closed-door meeting, at which Claimant was interrogated but prevented from explaining, constitutes another deterrent from filing a claim. Further, failing or refusing to mention that additional paperwork was required to obtain sick leave shows this meeting was not intended to promote understanding or designed for Claimant's benefit.

30. Ms. Krause's demeanor appeared evasive, particularly when the Referee asked clarification questions.

31. Ms. Calderon was not credible in her testimony about whether or when she knew Claimant would miss some work. Claimant was not working, although she was scheduled to be, on the very day and hour in which Ms. Calderon attended the May 23 meeting. Further, Ms. Calderon stated that important parts of her job are to be an "employee advocate" and to be responsible for payroll. She attended the May 23 meeting. Yet she did not inquire about whether Claimant's lost work time should be categorized as TTD, sick leave, or vacation leave. At that meeting, she did not tell Claimant about Employer's requirement that Claimant file a form in writing to receive sick leave benefits. Ms. Calderon is not credible

in her assertion that she works as an employee advocate. It is inherently improbable that Ms. Calderon was at that meeting for any purpose other than to provide Employer a "me too" whenever Ms. Krause recalled any comment or event concerning Claimant. Her "me too" function is exemplified by her signature to Ms. Krause's notes.

32. **Accident.** A claimant's injury must arise from an accident arising out of and in the course of employment. Idaho Code § 72-102(18); Seamans v. Maaco Auto Painting, 128 Idaho 747, 918 P.2d 1192 (1996). It is the long experience of the Industrial Commission that people not intimately familiar with the Idaho Workers' Compensation Law do not fully understand the legal scope of words like "accident" or "injury." As a result, no hypertechnical distinctions should be applied when a party testifies using the words "hurt" versus "injured." *See generally*, Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). *A fortiori*, legal definitions of such words should not bind a party who uses them conversationally during a miscommunication between lay people. There being no transcript of the "she said/she tried to say" conversation of May 23, this analysis does not depend upon what exact words were used by any participant in that meeting.

33. The best unbiased witness to any portion of this matter is found in Dr. Davis' note of May 22, 2006, in which he recorded that Claimant reported she had been injured at work in a manner entirely consistent with Claimant's testimony about the accident. Coming on the same day as the accident, that note supports Claimant's allegations. It makes it less likely that Claimant told a different story to Employer on May 23. Furthermore, Claimant's attempt at a written explanation of the "confusion" appears to be a generous attempt to avoid imputing any unreasonable motives to Ms. Krause.

34. The descriptions of the development and timing of pain in the notes of Drs. Henrie and Crane give one pause, but short pause only. First, these notes do not

purport to quote Claimant. Thus the adjectives used to describe the symptoms cannot be used to put words in Claimant's mouth. Second, Claimant testified that at the time of the accident she "cringed" and the co-worker asked if she was okay. This is reconcilable to the "immediate fairly severe pain" which Dr. Crane noted. Third, the intense pain "3 hours later" mentioned by both doctors is consistent with arising from her nap about three hours after she left work. These notes do not express an inconsistency with Claimant's testimony. The Referee will not infer that they imply one.

35. Claimant suffered an accident in the manner in which she described it on May 22, 2006.

36. **One additional note.** The question of TTDs was present at hearing but has been stipulated out of this decision by the parties. Therefore, by way of dicta, the parties are reminded that vacation pay cannot be substituted for or credited against TTDs ultimately owing to a claimant.

CONCLUSION OF LAW

Claimant suffered a compensable accident on May 22, 2006 which injured her right shoulder.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusions of Law as its own and issue an appropriate final order.

DATED this 9TH day of October, 2008.

INDUSTRIAL COMMISSION

/S/_____
Douglas A. Donohue, Referee

ATTEST:

/S/_____
Assistant Commission Secretary
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REANNA DIXSON, Claimant, v. PARKE VIEW CARE AND REHABILITATION CENTER, Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	)	**IC 2006-513747** **ORDER** FILED OCT 21 2008

Pursuant to Idaho Code § 72-717, Referee Douglas A. Donohue submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant suffered a compensable accident on May 22, 2006 which injured her right shoulder.

2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 21ST day of OCTOBER, 2008.

INDUSTRIAL COMMISSION

/S/_____
James F. Kile, Chairman

/S/_____
R. D. Maynard, Commissioner

/S/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

/S/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 21ST day of OCTOBER, 2008, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

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db

/S/_____